Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

W. DAVID LEAK, M.D., AND
PAIN CONTROL CONSULTANTS, INC.

Petitioners,

against

GRANT MEDICAL CENTER; GRANT ANESTHESIA ASSOCIATES, INC.; BHAGWAN SATIANI, M.D.; JAMES HIGHLY, D.O.; SAMBIT K. BARUA, M.D.; M. FARID EDWARDS, M.D.; MICHAEL MCKAY, M.D.; CHANG KIM, M.D.; LEE K. ROH, M.D.; KAREN LOGAN, M.D.; JON T. PRESTON, M.D.; BRADLEY GETZ, M.D.; AND; PAUL ADDESSI, M.D.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether conflict among the Circuit Courts of Appeals over the definition of antitrust standing has resulted in improper dismissal of Petitioners' antitrust claims?

The Circuit Courts of Appeals have not uniformly applied the Supreme Court's definition of antitrust standing in Associated General Contractors of California, Inc. v. California State Council of Carpenters et al., 459 U.S 519, 103 S.Ct. 897, 74 L.Ed.2d. 723, (1983), resulting in a conflict of law among the circuits. Petitioners Leak and Pain Control Consultants, Inc. now request that this Court grant certiorari to the United States Court of Appeals for the Sixth Circuit to resolve the conflict, and clarify its ruling on standing in Associated General Contractors, and establish their standing to maintain their antitrust claims against Respondents.

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CONFLICT OF LAW AMONG THE CIRCUITS. PETITIONERS LEAK AND PAIN CONTROL CONSULTANTS, INC. NOW REQUEST THIS COURT GRANT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT TO RESOLVE THE CONFLICT, CLARIFY ITS RULING ON STANDING IN ASSOCIATED GENERAL CONTRACTORS, AND ESTABLISH THEIR STANDING TO MAINTAIN THEIR ANTITRUST CLAIMS AGAINST RESPONDENTS. 8

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

To The Honorable Chief Justice and the Associate Justices of the Supreme Court

W. David Leak, M.D. and Pain Control Consultants, Inc., petition for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio (Appendix pp. 3-17), granting summary judgment pursuant to Federal Rule of Civil Procedure 56(c), against Petitioners, on July 18, 1995, was unreported. Only July 28, 1995, Petitioners filed a timely motion to reopen summary judgment pursuant to Federal Rule of Civil Procedure 59(a). Said motion was denied by the District Court on October 18, 1995. Petitioners filed a timely Notice of Appeal pursuant to Federal Rule of Appellate Procedure 3 on November 6, 1995. The opinion of the Court of Appeals for the Sixth Circuit, affirming the District Court, (Appendix pp. 19-20) was issued on December 13, 1996, similarly an unreported decision.

JURISDICTION

The judgment of the Court of Appeals was entered on December 13, 1996, (Appendix pp. 19-20). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The Sixth Circuit Court of Appeals had jurisdiction pursuant to its appellant jurisdiction over final decisions of the District Courts, 28 U.S. C. § 1291. The United States District Court, Southern District of Ohio, Eastern Division, had jurisdiction over Petitioners' claims pursuant to 28 U.S.C. §§ 1331, 1337, 1367, and 15 U.S.C. §§ 1 and 2.

STATEMENT OF THE CASE

Petitioner W. David Leak, M.D. is a physician licensed to practice medicine in Ohio and Pennsylvania. Dr. Leak's practice specializes in pain medicine. He has earned a national reputation and attracted a significant number of out of state patients. Furthermore, Dr. Leak has served as an expert consultant to out of state physicians and on national medical committees and was on the Examination Council of the American College of Pain Medicine.

Petitioner Pain Control Consultants, Inc. (PCC) is an Ohio corporation which provides comprehensive treatment for acute and chronic pain. Dr. Leak is the director and sole shareholder of PCC. A substantial portion of PCC's revenue is received from out of state sources, including federal Medicare and Medicaid funds and private insurance plans. In addition, a substantial portion of PCC's expenditures are to out of state vendors.

Respondent Grant Medical Center (Grant) is a hospital located in Columbus, Ohio. Respondent Grant Anesthesia Associates, Inc. (GAA) is an Ohio corporation which

provides anesthesia services to Grant. The following physicians comprised GAA, and are individual Respondents: James Highly, D.O.; Sambit K. Barua, M.D.; M. Farid Edwards, M.D.; Michael McKay, M.D.; Chang Kim, M.D.; Lee K. Roh, M.D.; Karen Logan, M.D.; Jon T. Preston, M.D.; Bradley Getz, M.D.; and, Paul Addessi, M.D. Respondent Bhagwan Satiani, M.D. is a member of Grant Medical staff and was Chair of the Credentials Committee at Grant.

Since 1984, Dr. Leak has been a Board Certified anesthesiologist specializing in pain medicine. Pain medicine deals with the diagnosis and treatment of acute and chronic pain, and is an area of practice distinct from the general practice of anesthesiology. A various times since 1988, Dr. Leak had been granted medical staff privileges at Grant to treat patients on a case by case basis.

On July 1, 1991, Dr. Leak submitted an application for medical staff privileges at Grant. Because the application had no department category for "Pain Medicine," Dr. Leak specified "Anesthesia" and "Surgery" as the departments for which he was seeking privileges. On March 3, 1992, Dr. Leak specified that he wished to confine his privileges to the area of comprehensive pain medicine and did not wish privileges for administering anesthesia services. Dr. Leak's application met each and every requirement for appointment to the Grant Medical staff, as set forth in Grant Medical Center's staff bylaws. On April 18, 1992, Dr. Leak received a letter from Grant, conferring provisional status in the Department of Anesthesia. A delay of nearly one year then ensued. On March 25, 1993, Respondent Edwards

advised Dr. Leak by letter that his application for privileges could not be processed because Grant had entered into an exclusive contract with GAA for the delivery of anesthesia services and that, "pain control management is included in the provision of anesthesia services." In response, Dr. Leak wrote a letter to Respondent Edwards on April 5, 1993 explaining that the field of pain medicine is multi-disciplinary and is not the same as pain management and is not confined to anesthesia services.

Under most of the managed care insurance plans where Grant Hospital is designated as a provider hospital, patients do not have a choice or are penalized for using a hospital not designated under the plan or a physician not on the staff of the designated hospital. Under most of the plans designating Grant as a provider hospital, Park Medical Center and Columbus Community Hospital, the two hospitals where Dr. Leak currently has staff privileges, are not designated hospitals. Therefore, patients under these plans must for insurance purposes be admitted to Grant or another hospital designated under the plan and use physicians on staff at Grant or other designated hospitals. Patients will rarely choose a hospital or physician not designated under their insurance plan.

As a result of the denial of privileges by Grant, and the exclusive contact between Grant and GAA, Dr. Leak was effectively precluded from treating and consulting on patients in need of hospitalization, where their insurance plans specified Grant and did not specify either of the two hospitals where Dr. Leak has staff privileges. Such patients were also

effectively denied the ability to use Dr. Leak's services due to the denial of privileges to Dr. Leak by Grant and the exclusive contract between Grant and GAA.

The practice of pain medicine is more cost efficient than the traditional practice of pain management by hospital based anesthesiologists. There is also a significant qualitative difference between the practice of pain medicine and the traditional practice of pain management by hospital based anesthesiologists. Pain medicine seeks a long-term solution to pain, rather than simply temporary relief.

Presently, no member on the medical staff of Grant or GAA has training or qualifications comparable to Dr. Leak's in the field of pain medicine.

STATUTORY SCHEME

This case presents issues concerning standing to maintain an antitrust action under the Sherman Act, 15 U.S.C. §§ 1 and 2. Section 1 of the Sherman Act reads in part as follows [15 U.S.C. § 1]:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 2 of the Sherman Act reads as follows [15 U.S.C. § 2]:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

THE DISTRICT COURT PROCEEDINGS

The instant action was filed in the United States District Court for the Southern District of Ohio, Eastern Division, on February 9, 1994. Respondents filed answers to Petitioners' Complaint and discovery ensued. Thereafter, Respondent filed a Motion for Summary Judgment, on the issue of Petitioners' antitrust standing, which the Court granted on July 18, 1995, disposing of all claims . (Appendix, pp. 1-2). On July 28, 1995, Petitioners filed a timely motion to reopen summary judgment pursuant to Federal Rule of Civil Procedure 59(a). Said motion was denied by the District Court on October 18, 1995. Petitioners filed a timely Notice of Appeal pursuant to Federal Rule of Appellate Procedure 3 on November 6, 1995.

THE SIXTH CIRCUIT DECISION

On December 13, 1996, The United States Court of Appeals for the Sixth Circuit issued a brief opinion, affirming the District Court's ruling against Petitioner and agreeing with the District Court's reasoning, (Appendix, pp. 19-20).

ARGUMENT FOR GRANTING THE WRIT

I. THE CIRCUIT COURTS OF APPEALS HAVE NOT UNIFORMLY APPLIED THE U.S. SUPREME COURT'S DEFINITION OF ANTITRUST STANDING ANNOUNCED IN ASSOCIATED GEN. CONTRACTORS OF CALIFORNIA, INC. v. CALIFORNIA STATE COUNCIL OF CARPENTERS ET AL., 459 U.S 519, (1983), RESULTING IN A CONFLICT OF LAW AMONG THE CIRCUITS. PETITIONERS LEAK AND PAIN CONTROL CONSULTANTS, INC., NOW REQUEST THAT THIS COURT GRANT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT TO RESOLVE THE CONFLICT, CLARIFY ITS RULING ON STANDING IN ASSOCIATED GEN. CONTRACTORS, AND ESTABLISH THEIR STANDING TO MAINTAIN THEIR ANTITRUST CLAIMS AGAINST RESPONDENTS.

In Associated Gen. Contractors, 459 U.S. 519, (1983), this Court considered a dispute between parties to a multi-employer collective-bargaining agreement. The Petitioner alleged that the union and its members coerced third parties to enter into business relationships with nonunion firms, adversely affecting the trade of certain unionized firms and restraining the business activities of the unions. Requesting treble damages under Sec. 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. Sec. 15, the unions presented to the Court the issue whether the unions had been, "injured in [their] business or property by reason of anything forbidden in the antitrust laws."

Analogizing Section 4 of the Clayton Act to Sections 1 and 7 of the Sherman Act, the Court noted that the lower federal courts virtually unanimously concluded that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. Stressing a need for judicial economy in limiting the types of cases a court would address, the Court discussed that the broad language of Sec. 4 of the Clayton Act would not permit every person tangentially affected by an antitrust violation to recover triple damages. To decide which plaintiffs might recover, and to specifically address the Union's standing to maintain suit, the Court stated its definition of standing in footnote:

> . . . as was required in common-law damages litigation in 1890, the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them. [31]
>
> [31] The label "antitrust standing" has traditionally been applied to some of the elements of this inquiry. As commentators have observed, the focus of the doctrine of "antitrust standing" is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action. . . . Associated Gen. Contractors, 459 U.S. at 535.

Refraining from issuing a black-letter rule of law on antitrust standing, this Court listed several factors which control antitrust standing, including the causal connection between an antitrust violation and harm to the Plaintiff; the nature of the plaintiff's alleged injury and the economic freedom of participants in the relevant market; plaintiff's status as either a consumer or a competitor in the market in which trade was restrained; whether plaintiff's injury was of the type of injury to competition which Congress intended the antitrust laws to forestall; the directness or indirectness of plaintiff's injury; and the degree of speculativeness of plaintiff's damages, Associated Gen. Contractors, 459 U.S. at 538-543.

Evaluating all of the announced factors, this Court concluded the Union lacked sufficient consequential harm resulting from an antitrust law violation:

> . . .the Union's allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the Union, are insufficient as a matter of law. Other relevant factors - the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy - weigh heavily against judicial enforcement of the Union's antitrust claim. Associated Gen. Contractors, 459 U.S. at 545.

From a footnote in Associated Gen. Contractors, antitrust standing became a threshold test for the Circuit Courts to apply to all private parties claiming antitrust injuries. A uniform application, however, did not develop. Several Circuits developed different factors to analyze when deciding an antitrust plaintiff's standing to maintain suit. Petitioner Leak's status with reference to antitrust standing currently lies in issue due to the conflict among Circuits over what constitutes antitrust standing.

In the Second Circuit, the Court of Appeals adopted a two-pronged threshold test for antitrust plaintiffs to

maintain an antitrust lawsuit. In Balaklaw v. Lovell, 14 F. 3d 793 (2d Cir. 1994), the Second Circuit looked to the Seventh Circuit and to Associated Gen. Contractors, 459 U.S. 519, and concluded:

> . . . Over time, courts have developed a two-pronged analysis to determine whether a plaintiff has antitrust standing. As a necessary first step, courts must determine whether the plaintiff suffered an antitrust injury. If the answer to that question is yes, they must then determine whether any of the other factors, largely relating to the directness and identifiability of the plaintiff's injury, prevent the plaintiff from being an efficient enforcer of the antitrust laws. . . . Balaklaw, 14 F. 3d at 796, footnote 9.

The Fifth Circuit followed a similar, two-pronged test, which required a plaintiff asserting an antitrust claim to demonstrate both antitrust injury and antitrust standing. In Walker v. U-Haul Co. of Mississippi, 734 F. 2d 1068 (5th Cir. 1984), the Court held franchisee Walker could not recover from franchisor U-Haul on antitrust claims because he failed to demonstrate antitrust injury, as defined in Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977):

> Walker and U-Haul disagree on whether the district court dismissed Walker's Section 2 claim because Walker lacked standing to assert it or because Walker had failed to offer evidence of any injury to

competition. Proof of both is essential to antitrust recovery. . . . Walker, 734 F. 2d at 1072.

Following Associated Gen. Contractors admonition that, "courts should analyze each situation in light of the factors set forth," 459 U.S. 519 at, 536 n. 33, the Court concluded that Walker failed to demonstrate an injury to competition and therefore could not maintain an antitrust claim.

The Sixth Circuit adopted a five factor test, most recently detailed in Bodie-Rickett and Associates v. Mars, Incorporated, 957 F. 2d 287 (6th Cir. 1992):

> This circuit first articulated the Associated Gen. Contractors factors in Southaven Land Co. v. Malone & Hyde, Inc., 715 F. 2d 1079 (6th Cir. 1983). Those factors on which the standing issue turns are: (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation. Id. at 1085. These factors are to be balanced; no single factor is conclusive. Peck v.

General Motors Corp., 894 F. 2d 844, 846 (6th Cir. 1990).

With little analysis of the five factors, the Court then determined that because there were more direct victims of the allegedly anticompetitive conduct, Petitioner lacked antitrust standing to maintain suit. In other words, plaintiff was not an efficient enforcer of antitrust claims, therefore he did not have antitrust standing regardless of the antitrust injury suffered:

> . . . according to plaintiff's view of the events, the intended targets of Mars' alleged conspiracy were competing manufacturers and wholesale customers. These are the direct victims; Bodie-Rickett is merely an indirect victim and, as such, is not the ideal private party "to vindicate the public interest in antitrust enforcement [.]" Associated Gen. Contractors, 459 U.S. at 542.

The Court also discussed the need to examine an antitrust plaintiff's status in the, "relevant market" as part of its evaluation of standing. The Bodie Plaintiff's failure to qualify as either a consumer or competitor of defendant served as a definitive reason why plaintiff lacked standing.

The Seventh Circuit similarly demanded plaintiffs to demonstrate both antitrust injury and standing, using a multifactor, case by case analysis of standing:

> Standing, . . . examines the connection between the asserted wrongdoing and the claimed injury to limit the class of potential plaintiffs to whose who are in the best position to vindicate the antitrust infraction. . . Greater Rockford Energy and Technology Corp. v. Shell Oil Company, 998 F.2d 391 (7th Cir. 1992).

The Court analogized antitrust standing to tort action elements, looked to Associated General Contractors, 459 U.S. at 533, and concluded an antitrust Plaintiff must satisfy four factors: (1) a duty recognized by the antitrust laws; (2) a violation of the antitrust laws; (3) injury to an interest protected by the antitrust laws and attributable to the antitrust violation (antitrust injury) and (4) a direct link between an antitrust violation and the antitrust injury (standing), Greater Rockford, 998 F.2d 391 at 395. The Court then discussed the need to limit potential antitrust Plaintiffs to only those in the best position to vindicate the antitrust infraction. If a plaintiff is not an efficient enforcer of antitrust laws, the Seventh Circuit will deny that plaintiff standing.

In Todorov v. DCH Healthcare Authority, 921 F.2d 1438 (11th Cir. 1991), the Eleventh circuit Court of Appeals took up the issue of standing, with which it admitted the federal courts had long struggled to determine a precise test for gleaning the proper party to bring an antitrust lawsuit:

> . . . in truth, "[t]he issue of antitrust standing has become somewhat confused." Local Beauty Supply,

> Inc. v. Lamaur Inc., 787 F.2d 1197, 1201 (7th Cir. 1986). A two-pronged approach has slowly developed to examine whether a plaintiff is a proper party and thus should be afforded antitrust standing. First, a court should determine whether the plaintiff suffered "antitrust injury"; second, the Court should determine whether the plaintiff is an efficient enforcer of the antitrust laws, which requires some analysis of the directness or remoteness of the Plaintiff's injury.

To reiterate the Eleventh Circuit's words, the issue of antitrust standing remains confused to this day, with each circuit pronouncing its own interpretation of this Court's holding in Associated Gen. Contractors, 459 U.S. 519 (1983). Plaintiffs, like Petitioners Leak and PCC, fall victim to this confusion, when a Circuit Court applies its individual interpretation of antitrust standing, and denies him or her standing to address antitrust injuries.

The Sixth Circuit agreed with the U.S. District Court that Petitioners lacked antitrust standing because Petitioner Leak had staff privileges at two Columbus hospitals. (Appendix at p. 14).

While the District Court's conclusion appeared to comport with this Court's holding in Summit Health, LTD. et al. v. Pinhas, 500 U.S. 322 (1991), it lies in direct conflict with that opinion and provides an eloquent example why this Court should resolve the Circuit Courts' confusion over what

constitutes antitrust standing. In Summit Health, Id., this Court held removal of one physician from a relevant geographic market does not constitute sufficient injury to competition to qualify as an antitrust injury which Congress designed the antitrust laws to forestall:

> The Court's suggestion that competition in the entire Los Angeles market was affected by this one surgeon's exclusion from that market simply ignores the "practical economics" of the matter. Summit Health, 500 U.S. at p. 338.

Turning to the practical economics of Petitioners' position, definition of the relevant market lies directly in issue, with Petitioners advancing a definition of relevant market which make their exclusion a clear antitrust injury of the kind Congress intended the antitrust laws to forestall: if Petitioner Leak continues to be denied staff privileges at Grant, not merely a single physician will be eliminated from competition in a relevant market; an entire category of treatment, pain medicine, will be eliminated from that relevant market. Petitioner Leak is the only Columbus, Ohio physician who practices pain medicine, a direct competitor of Respondents' pain management practice. Such a result contravenes this Court's holding in Summit Health, 500 U.S. 322 (1991) where merely one physician and not an entire treatment category, were excluded from the market. This Court should grant Certiorari to Petitioners to prevent such erroneous

application of Summit Health, Id., and Associated Gen. Contractors, 459 U.S. 519 (1983).

II. THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S SUMMARY JUDGMENT AGAINST PETITIONERS ON THE BASIS OF AN INFERENCE, DRAWN AGAINST THEM, THAT BECAUSE PETITIONER LEAK HAS HOSPITAL STAFF PRIVILEGES AT TWO HOSPITALS WITHIN THE COLUMBUS AREA, THEY ARE ABLE TO FULLY COMPETE FOR PAIN RELATED MEDICAL SERVICES, AND THEREFORE LACK STANDING TO MAINTAIN THIS ACTION.

Respondents' Motion for Summary Judgement urged the District Court to find that Petitioners lacked standing to maintain this action on the basis that Dr. Leak has privileges at two other hospitals and on the basis that patients and the government would be more efficient enforcers of the antitrust laws. The Court reviewed antitrust case law and correctly stated that to have antitrust standing, a Plaintiff must show antitrust injury. The Court then held that:

> In the circumstances presented in this case, . . . the Court finds that Plaintiffs have not suffered the kind of injury that antitrust laws were designed to prevent. **Dr. Leak has staff privileges at two other Columbus area hospitals. Plaintiffs are therefore**

> **fully able to compete** with others offering pain-related medical services in the Columbus area, including GAA and its members. (Appendix pp. 14-15). (Emphasis added).

In making its finding, the Court drew an inference. The Court inferred that because Dr. Leak has staff privileges at two other hospitals, he is able to fully compete in the Columbus area market for pain-related medical services. The Court then concluded from its inference about Dr. Leak's ability to compete that he had not suffered the kind of injury that antitrust laws were designed to prevent.

Both the U.S. Supreme Court and the Sixth Circuit Court of Appeals have held that when considering summary judgment, all inferences drawn from the evidence must be viewed in a light most favorable to the party opposing the Motion, in this case, Appellants. In United States v. Diebold Inc., 369 U.S. 654 (1962), the United States Supreme Court held that upon summary judgment, the inferences to be drawn from underlying facts contained in pleadings and affidavits must be viewed in the light most favorable to the party opposing the Motion. Because the trial court drew inferences from affidavits in a light disfavorable to the non-movant, the Supreme Court reversed the summary judgment and remanded the case to the trial court for trial on the merits.

In Bender v. Southland Corp., 749 F. 2d, 1205 (6th Cir. 1984), this Court held that summary judgment is not prohibited in antitrust cases, but is disfavored. The general rule that a movant must conclusively show that no genuine

issue of material fact exists and that the movant is entitled to judgment as a matter of law, must be strictly applied with all of the evidence and all reasonable inferences which may be drawn therefrom, viewed in a light most favorable to the party opposing the Motion. The District Court's inference against Petitioners, formed the basis for its holding regarding standing and clearly is erroneous.

The District Court's inference that Petitioners are able to fully compete in the Columbus market for pain related medical services rests upon the presumption that a physician who has privileges at one hospital is able to treat the same patients at a different hospital. If this were simply a case of denial of privileges or of an exclusive contract where the affected physician was able to treat the same patients at another hospital, standing might be a legitimate issue. However, under the facts of this case, as plead and supported by the record, this is not the situation.

The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but better goods and services. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements including quality and service, not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers or providers. National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978). Quality of care is particularly relevant in the area of medical services. See, Robinson v. Magovern, 521 F. Supp. 842, 877 (W.D. PA 1981).

The issue of injury for purposes of antitrust standing does not come down solely to whether a plaintiff is still able to compete at some level. An agreement to restrain trade may be unlawful even though it does not entirely exclude competitors from the market. Activity that prevents consumers from making free choices between market alternatives is inherently destructive of competitive conditions. Associated Gen. Contractors, 459 U.S. at 528 (1983).

In the leading case of Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984), the Court held that an exclusive contract for anesthesiological services would constitute an illegal tying arrangement only if patients are forced to purchase the contracting firm's services as a result of the hospital's market power. The Court noted that if no forcing is present, patients are free to enter a competing hospital and use another anesthesiologist. In Jefferson Parish, at 30, the Court specifically noted that there was no evidence that patients were unable to go to another hospital that would provide them with their choice of physician.

Petitioners, have suffered antitrust injury because they have been foreclosed as a result of Respondents' actions from being able to compete in providing in-hospital and in-office consultations and treatment related to the practice of pain medicine to a significant segment of the patient population. That segment of the population is composed of those patients who, due to their managed care insurance plans, are limited to using either Grant or another hospital other than Park Medical Center or Columbus Community Hospital. This

segment of the patient population is a discrete sub-market due to the lack of freedom of choice that they have to chose one hospital over another.

The harm to Petitioners goes beyond not being able to provide in-hospital services to these patients. The denial of privileges results in Dr. Leak not being able to be a designated provider for office based services under managed care plans where Grant is a designated hospital and Park Medical Center or Columbus Community Hospital are not designated. Further, because the practice of pain medicine is not an exclusively hospital based practice, Respondents' interpretation of their contract as applying to procedures and treatments necessary to the practice of pain medicine combined with the requirement that employees of GAA be hospital based means that they have foreclosed all practitioners of pain medicine other than members of GAA from being able to practice at Grant.

In summary: 1) due to the prevalence of managed care insurance plans, a significant percentage of patients are locked into using hospitals designated under these plans or are penalized for using non-designated hospitals; 2) Grant Hospital is a designated hospital under many plans which do not also designate either of the hospitals where Dr. Leak has privileges; 3) the patients covered by such plans represent a sub-market; 4) the denial of privileges to a qualified physician to practice at a particular hospital, deprives the physician of access to those patients for both in-hospital and in-office services and limits the choice of such patients to those

physicians who have been granted privileges at said hospital; 5) denial of privileges therefore results in limiting competition for that segment of the patient population; and 6) limiting competition results in limiting price competition and the consumer's choice based on the quality and nature of services.

Limiting the consumers' choice to purchase services from a specific provider and, likewise, not permitting the provider to sell his services to those consumers is on its face anti-competitive. The number of competitors has been limited by Defendants-Appellees. Other providers of the services are excluded from competing for that same pool of consumers.

Due to managed care insurance plans, Grant has effectively become an essential facility in order for Dr. Leak to provide services to those patients who must use Grant and for those patients to be able to chose Dr. Leak. Therefore, the denial of privileges to Dr. Leak denies them access to an essential facility. The exclusive contract between Grant and GAA requires patients who are admitted to Grant and are in need of pain medicine services to use physicians employed by GAA. This is an unlawful tying arrangement for those patients who do not have the choice of another hospital. They are limited to using physicians who have privileges at Grant.

The exclusive contract between Grant and GAA is also a group boycott of any competitor, including Dr. Leak, who is not a member of GAA. This may not necessarily be anti-competitive if Dr. Leak was able to compete for the same patients without being a member of GAA. However, this is

not the case.

Within the market as presented by the Complaint in this case, Petitioners have suffered the type of injury that the antitrust laws were intended to prevent. They have been eliminated as competitors with respect to a significant segment of the patient population. The anti-competitive effects of Respondents' actions include not only the issue of costs to the consumer, but also prevent consumer choice based upon consideration of the quality of services that are provided by Dr. Leak, his training, skill and experience, and simply personal preference based upon trust, personality, and professional manner, which are so involved with choice of a physician. In addition, there is a difference in the nature of the services offered in the practices of pain medicine and pain management that affect consumer choice.

The District Court, (Appendix p. 14), stated that it was not creating a per se rule that a health care professional could never have standing to assert antitrust claims arising from the denial of hospital staff privileges. However, the Court did just that in essence ruling that if a physician has privileges at another hospital in the same geographic area, he or she can not suffer the kind of injury that the antitrust laws were designed to prevent. While the Court states that its finding is based on the facts of this case, the only fact to which the Court points is that Dr. Leak has privileges at two other hospitals.

To the extent that the Court held as a matter of law, that Appellants lack antitrust standing due to having staff privileges at two hospitals within the same geographic area,

the Court's conclusion of law is in error. Further, the Court's finding of fact that Plaintiffs-Appellants are able to fully compete in the Columbus area is based upon an inference drawn by the trial court adverse to the non-moving parties and is directly contrary to the only evidence in the record with respect to Petitioners' ability to compete, which clearly demonstrates that they are not able to fully compete because Dr. Leak is not able to treat patients who would be required by their insurance to use Grant Medical Center and thereby would be limited to using GAA.

For the above reasons, Petitioners respectfully request that this Court grant certiorari to review the judgment of the Sixth Circuit Court of Appeals.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served via U.S. mail upon John H. Burtch, Esq., Baker & Hostetler, Suite 2100, 65 E. State Street, Columbus, Ohio 43215-4260, and on Douglas E. Graff, Esq., 604 East Rich Street, Suite 2100, Columbus, Ohio 43215 on this 13th day of March, 1997.

Donald J. McTigue